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CASE NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

JANICE BUTTRUM,

Petitioner,

-vs-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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QUESTIONS PRESENTED

I. IS EXPERT WITNESS TESTIMONY WHICH PREDICTS THE LIKELIHOOD OF THE CAPITAL DEFENDANT'S COMMITTING FUTURE ACTS OF VIOLENCE SUFFICIENTLY RELIABLE TO BE ADMISSIBLE AT A CAPITAL SENTENCING PROCEEDING?

II. IF EXPERT WITNESS TESTIMONY AS TO THE LIKELIHOOD OF FUTURE ACTS OF VIOLENCE IS NOT BARRED ALTOGETHER BY THE FEDERAL CONSTITUTION, ARE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS VIOLATED IF:

1. THE EXPERT WITNESS HAS NOT EXAMINED THE DEFENDANT;

2. BASES HIS CONCLUSION LARGELY ON HEARSAY AND FACTS NOT IN EVIDENCE BEFORE THE SENTENCING JURY;

3. THE INDIGENT DEFENDANT IS REPEATEDLY DENIED REQUESTS FOR AN INDEPENDENT PSYCHIATRIC EXAMINATION AT STATE EXPENSE; AND

4. THE EXPERT IS THE ONLY WITNESS CALLED BY THE PROSECUTION TO ESTABLISH AGGRAVATING CIRCUMSTANCES AT THE SENTENCING PROCEEDING?

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OPINIONS BELOW

The decision of the Supreme Court of Georgia, affirming the conviction and sentence of Petitioner, is not yet reported, but is reproduced in the Appendix of this Petition at pages A-1 through A-16.

The decision of the Supreme Court of Georgia is not reported; trial proceedings are reproduced in the Appendix at pages A-22 through A-60.

JURISDICTION

Petitioner respectfully requests this Court to invoke jurisdiction under 28 U.S.C. § 1257(3). The Superior Court of Whitfield County convicted Petitioner of murder and theft by taking on August 30, 1981. On the next day, Petitioner was sentenced to die in the electric chair. Both the convictions and sentences were affirmed by the Supreme Court of Georgia. On August 26, 1982, Justice Powell extended the time in which to file a Petition for a Writ of Certiorari until October 6, 1982. Petitioner prays that this Court grant the Writ of Certiorari for the reason that the state courts in the instant case have incorrectly decided important federal questions that should be settled by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution*

Amendment VI

Amendment VIII

Amendment XIV

*Full Text of Amendments Are Reproduced in the Appendix at A-61.

Georgia Code**

Chapter 38-3 (Hearsay)

Selected Provisions

**Full Text of Selected Provisions Are Reproduced in the Appendix to this Petition, at pages A-62 to A-64.

STATEMENT OF THE CASE

In the early morning hours of September 3, 1980, Demetra Faye Parker was murdered near Dalton, Georgia. On September 4, 1980, seventeen year old Petitioner Janice Buttrum and her husband, Danny Buttrum, were arrested in Pensacola, Florida and transported to Dalton. The two were indicted by a grand jury on October 13, 1980 on the capital charge of the murder of Demetra Parker, as well as theft of her automobile.

On October 23, 1980, defense counsel filed a Special Plea of Incompetency to Stand Trial, and a trial on this issue was held on the 4th, 5th, and 6th of February, 1981. The Jury found her competent to stand trial. At the time the Special Plea was made, defense counsel also made motions for a state- funded, private psychiatrist and other witnesses to participate in the defense's preparation for trial (A-51). The Superior Court of Whitfield County overruled these motions (A-51). The Motion for a private psychiatric examination and testing was re-urged on February 24, 1981, and denied the following day (A-52).

On August 13, 1981, the date set for the final motions in the case (A-55), the District Attorney disclosed that a psychologist, Dr. Henry Adams, had reviewed the case, and formed an opinion and clinical impression of Janice Buttrum (A-56). A copy of Dr. Adams' report was provided to defense counsel at that time (A-56).

In response to this disclosure, defense counsel, at a hearing on August 19, 1981, again moved for a state-funded private psychiatrist to assist in Janice Buttrum's defense--specifically in regard to Dr. Adams' opinion and expected testimony. Defense counsel stated:

> "We don't have access to a person like Dr. Adams, and we feel in fundamental fairness, the dictates of the Fourteenth Amendment, Sixth Amendment, and Fourth Amendment of the State and Federal Constitutions demand that we be treated fairly and that we have an adequate opportunity to countermand this sort of very significant evidence . . . when the District Attorney senses the need to go out and secure private psychiatric assistance in the prosecution, we sense the need; and these motions are simply in response to that--" (A-57.)

The trial court denied the motion (A-57). Counsel then requested a continuance of a few days in order "to prepare to deal with this sort of adverse evidence," (Adams' anticipated testimony). (A-59.) The trial court denied the motion for continuance, concluding that the five days remaining before trial provided ample time to confer with the State psychologists and psychiatrists who had earlier evaluated Janice Buttrum and found her competent to stand trial. (A. 60.)

The Guilt-Innocence phase of Janice Buttrum's bifurcated trial began on August 24, 1981. On August 30, 1981, she was found guilty of murder and theft by taking.

The sentencing phase commenced immediately thereafter, and continued to the next day, when the jury sentenced her to death by electrocution. During the sentencing proceedings, the sole witness presented by the prosecution for the purpose of establishing aggravated circumstances was psychologist Henry Adams. He informed the jury that eighteen year old (A-39) Janice Buttrum was "an anti-social personality, and a case of paraphilia sexual sadism." (A-30.) He explained that, "when [this] disorder really becomes severe the [individual] may torture, kill, mutilate their victims. It is a repetitive kind of activity that continues until the individual is apprehended, or stopped in some way or another." (A-22.) When asked if he had an opinion as to

the potential for other acts, Adams testified that, "Part of the definition of sexual sadism is repetitive acts; . . . you would expect it to continue." (A-31.)

A personal examination of Ms. Buttrum was never made by Henry Adams, however, nor was any attempt made to do so. (A-32, 33.) The conclusions reached by Henry Adams were claimed to be based on a non-specified package of psychiatric reports, Janice Buttrum's confessions, F.B.I. Reports, the autopsy report and photographs of the victim, and interviews with certain unidentified jailers. (A-25, A-26.)

With the exception of some photographs, none of this material was placed in evidence at the sentencing phase. (A-25, A-26, A-38.) Some aspects of the confessions, F.B.I. Reports, autopsy report, and photographs had been placed before the Jury in the guilt phase but were not re-introduced. Further, the psychiatric reports and interviews with unidentified jailers purportedly relied upon were not placed in evidence at the guilt or sentencing phases.

Counsel objected strenuously and continuously to the course of testimony of Henry Adams:

> "We would raise the objection that, one it's based upon hearsay, two; it's based upon conclusions made by others--opinions of others, people not under his control or authority; that it contains--based upon facts not evidence, facts not supported by the evidence that the testimony is irrelevant and calculated to inflame and prejudice the jury; and that it is an improper area for expert opinion . . . , and Your Honor, we feel that all of this is improper, and to allow this gentleman to go on would be to deny Janice Buttrum her rights to due process and to a fair trial, as stated in the Fifth, Sixth, Eighth, and Fourteenth Amendments." (A-27, A-28, A-29.)

Counsel further objected that any:

> "speculation or predict[ion] [as to] criminal behavior . . . is totally improper, on the same constitutional grounds that we urged before." (A-31.)

The trial judge overruled all objections to this testimony (A-28, A-31). Defense counsel cross-examined Henry Adams, then proceeded to present lay witnesses in mitigation, testifying to her very "deprived upbringing." (A-8.)

In closing argument, the District Attorney invited the sentencing jury to consider this "deviant pervert, a murderer, a butcher," (A-41), as one who "potentially could do it again," (A-42), adding, "Who will be next? You? Your wife? Your daughter?" (A-42), and finally, "God save us all from Janice Buttrum . . . may Janice Buttrum never again haunt society." (A-43.)

The trial judge proceeded to inform the jury of the aggravating circumstances: murder in the commission of aiding and abetting rape; murder which was outrageously and wantonly vile, horrible or inhuman, in that it involved either torture to the victim; or depravity of mind of the Defendant; or an aggravated battery to the victim (A-44, A-45, A-46, A-47, A-48). The jury found all aggravating circumstances existed and imposed the death penalty. (A-50.)

Janice Buttrum argued on appeal to the Georgia Supreme Court that the trial court erred in admission of Henry Adams' testimony, as it was based upon hearsay and facts not in evidence, that it was "inappropriate to speculate about the (Petitioner's) future behavior," and "patently unfair" to allow this information to be considered in determining if the aggravating circumstance of "depravity of mind" was present. [Brief of Appellant, Assignment of Error No. 1, (A-12, A-13, A-14)]. Further, Petitioner Buttrum contended that the use of this expert testimony collectively with other actions by the judge and prosecutor resulted in an "arbitrary and capricious" sentencing decision "infected by emotionalism, passion, and prejudice," in violation of the Eighth and Fourteenth Amendments. [*Id.*, Assignment of Error No. 2. (A-15, A-16, A-17).]

The Georgia Supreme Court affirmed Janice Buttrum's conviction and death sentence on July 8, 1982. The Court concluded that the expert witness' testimony was admissible:

> "The fact that an expert's opinion may be based in part on facts not in evidence goes to the weight and credibility, not to its admissibility. *Redfield v. State*, 240 Ga. 460(1), 241 S.E. 2d 217 (1978) and cases cited." (A-7.)

The Court's sentence review concluded:

> "The sentence of death imposed in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor." (A-8.)

In respect to the denial of a private psychiatric examination at state expense to respond to Henry Adams' testimony, counsel for Janice Buttrum addressed this in Enumeration of Error No. 8, contending:

> "The trial court's failure to appoint expert assistance for the Appellant not only denied her due process of law, but denied her her Sixth Amendment right to effective assistance of counsel as well." (A-18.) [and that], "The Court erred in denying the Appellant expert assistance equivalent to that provided by the State." (A-19.)

The Georgia Supreme Court concluded that there had been "no abuse of discretion in denying the motion for funds for expert witnesses." (A-5.) The Court relied on a statement of defense counsel to conclude there was "no critical evidence subject to varying opinion." (A-5.)

However, the statement the Georgia Supreme Court relied upon was made at the February 1981 hearing, and related to a request for a forensic criminologist. This was unrelated and irrelevant to the other issue briefed by the Appellant in the Georgia Supreme Court, in the latter portion of Enumeration of

Error No. 8, (ending at A-19). This issue, the trial court's denial on August 19, 1981 of an independent psychiatric examination to countermand the expected testimony of Henry Adams therefore was not accurately addressed by the Georgia Supreme Court. A Motion for Extension of Time in which to file a Petition for Certiorari was granted by Justice Powell on August 26, 1982, and the case is now before this Court.

ARGUMENT

I. THE EIGHTH AND FOURTEENTH AMENDMENTS BAR THE ADMISSION OF EXPERT WITNESS TESTIMONY REGARDING THE LIKELIHOOD OF THE CAPITAL DEFENDANT'S COMMISSION OF FUTURE ACTS OF VIOLENCE, AS SUCH PREDICTIONS ARE NOT SUFFICIENTLY RELIABLE TO BE CONSIDERED BY THE CAPITAL SENTENCING JURY, AND IF CONSIDERED, MAY YIELD ARBITRARY AND CAPRICIOUS SENTENCES OF DEATH.

The only witness called by the State of Georgia at Janice Buttrum's sentencing proceeding for the purpose of establishing aggravating circumstances was Henry Adams, a psychologist. Adams testified that he believed Janice Buttrum had an anti-social personality, was a case of paraphilia sexual sadism (A-30), and that he would expect her to continue to commit similar acts of sexual assault and homicide in the future. (A-31.)

Counsel for Mrs. Buttrum entered a continuing objection to this testimony:

> ". . . the testimony is irrelevant and calculated to inflame and prejudice the jury; and that it's an improper area for expert opinion . . . that to allow this gentleman to go on would be to deny Janice Buttrum her rights to due process and to a fair trial, as stated in the Fifth, Sixth, Eighth, and Fourteenth Amendments." (A-27, A-28.)

Motions for mistrial were made at the close of direct examination (A-30), cross examination (A-37), and at the close of

the evidence (A-40). All objections and mistrial motions were overruled.

This Court has recognized that the Eighth and Fourteenth Amendments demand a greater "reliability in the determination that death is the appropriate punishment," (*Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

The evidence presented in aggravation at a capital sentencing proceeding should thus possess "a greater degree of reliability," so as not to "create the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Even if one assumes that the risk posed to the safety of others by a convicted capital defendant is relevant in the capital sentencing proceeding, *c.f. People v. Murtishaw*, 29 Cal. 3d 733, 175 Cal. Rptr. 738, 631 P. 2d 446, 469-470 (1981), *cert. denied* ___ U.S. ___, 50 U.S.L.W. 3591 (1982), expert witness testimony as to future dangerousness is a constitutionally insufficient method of assessing this possibly relevant factor.

This Court has recognized that, "Given the lack of certainty and fallibility of psychiatric diagnosis," there is a "serious question" as to whether psychiatric diagnosis can ever establish a defendant's future dangerousness beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 429 (1979). The Court's statement as to the very questionable reliability of these expert predictions is strongly supported by those very persons expected to make them. The American Psychiatric Association's *Task Force Report on Clinical Aspects of the Violent Individual*, at 23, described such testimony as "fundamentally of very low reliability." (Emphasis added.)

A Task Force of the American Psychological Association similarly concluded that:

> ". . . the validity of psychological predictions of violent behavior, at least in the sentencing and release situations . . . is extremely poor." *Report of the Task Force on the Role of Psychology in the Criminal Justice System*, 33 *Am. Psychologist* 1099, 1110 (1976). (Emphasis added.)

In the 1979 Term of this Court, the American Psychiatric Association, in an extensive *Amicus Curiae* Brief to *Estelle v. Smith*, 451 U.S. 454 (1981), requested that:

> "In the unique circumstances of a capital case, this Court should prohibit the use of such testimony altogether, and thereby bar false claims to expertise that inevitably distort the jury's fact-finding process." Brief *Amicus Curiae* of the American Psychiatric Association at 10, *Estelle v. Smith*, 451 U.S. 454 (1981).

In *Estelle*, this Court concluded that excluding expert testimony as to future dangerousness on grounds of violation of the Fifth, Sixth, and Fourteenth Amendments, would not prevent the State of Texas from proving the defendant's future dangerousness as required by their statute, as the "issue is in no sense confined to the province of psychiatric experts." *Id.*, at 472.

Given the availability of lay witness testimony; the almost universally acknowledged unreliability of expert predictions of future dangerousness, Brief *Amicus Curiae*, *supra*, at 11-14; Dix, "Expert Prediction Testimony in Capital Sentencing: Evidentiary and Constitutional Considerations," 19 *Amer. Crim. L. Rev.* 1, 16-21 (1981); and that such "psychiatric testimony is especially susceptible to uncritical acceptance by sentencing juries," Dix, *supra*, at 43, n. 215, such testimony should be excluded from capital sentencing proceedings. Expert witness testimony as to the likelihood of future dangerousness simply "introduces a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Beck v. Alabama*, 447 U.S. 625, 643 (1980).

This issue is ripe for decision. Expert testimony as to future dangerousness is still rather widely permitted in capital prosecutions and across the country, see Dix, *supra*, at 4-6. One court has already ruled such testimony is generally inadmissible due to its unreliability, *People v. Murtishaw*, *supra*, 631 P. 2d, at 470. See Note, "*People v. Murtishaw:* Applying the *Frye* Test to Psychiatric Predictions of Dangerousness in Capital Cases," 70 *Calif. Law R.* 1069, 1077-1084 (1982). The professional associations affected have given their opinion of this form of testimony and one, as noted, has already requested this Court rule in accordance with Petitioner Buttrum's argument.

II. THE ADMISSION OF AN EXPERT WITNESS OPINION THAT JANICE BUTTRUM WOULD ENGAGE IN FUTURE ACTS OF VIOLENCE DENIED HER A FAIR AND RELIABLE DETERMINATION THAT DEATH IS HER APPROPRIATE PUNISHMENT AS REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS, CONSIDERING THE TOTALITY OF CIRCUMSTANCES:

1. EXPERT WITNESS TESTIMONY OF THIS TYPE IS GENERALLY OF VERY LOW RELIABILITY;
2. THE EXPERT WITNESS NEVER PERSONALLY EXAMINED OR INTERVIEWED JANICE BUTTRUM;
3. THE EXPERT WITNESS BASED HIS CONCLUSION ON HEARSAY AND MATERIALS NOT IN EVIDENCE BEFORE THE JURY;
4. THE TRIAL COURT REPEATEDLY REFUSED THE INDIGENT JANICE BUTTRUM'S REQUESTS FOR AN INDEPENDENT PSYCHIATRIC EXAMINATION AT STATE EXPENSE; AND
5. THE EXPERT WITNESS WAS THE ONLY WITNESS CALLED BY THE PROSECUTION TO ESTABLISH AGGRAVATING CIRCUMSTANCES AT THE SENTENCING PROCEEDING.

"Fundamental principles of procedural fairness apply at the penalty phase of a trial in a capital case," *Presnell v. Georgia*, 439 U.S. 14, 16 (1978) (*per curiam*). As earlier noted, the Eighth and Fourteenth Amendments also require "a greater degree of reliability when the sentence of death is imposed." *Lockett*, *supra*, at 604.

Under the totality of the circumstances herein, Janice Buttrum was denied her right to a fair and reliable determination that death is her appropriate punishment.

1. Expert Witness Opinion Testimony of This Type is Generally of Very Low Reliability

As more fully discussed in the Argument for the First Question Presented, expert witness prediction testimony is generally acknowledged to be of low accuracy. Experts "too often predict dangerousness, especially in the case of the mentally ill offender," and exhibit a "tendency toward false positive errors in prediction." Brief *Amicus Curiae*, American Psychiatric Association, *supra* at 15, n. 8.

If this be true of such testimony generally, in Janice Buttrum's case the odds that an accurate and reliable prediction of future dangerousness was presented to the sentencing jury are practically nil.

2. The Expert Witness Never Personally Examined or Interviewed Janice Buttrum

The trial court qualified Henry Adams as an expert and allowed him to give his own frightening predictions of eighteen year-old Janice Buttrum's future without Adams ever having seen her, observed the course of the trial, or been advised of the facts before the jury (A-32, A-33). He had not attempted to examine her (A-32, A-33), nor were any examinations administered by another under Adams' supervision or control.

The extensiveness of an examination as to future dangerousness clearly reflects on the likely reliability of any

conclusions therefrom, see *People v. Murtishaw, supra,* 631 F. 2d, at 470; and *Holloway v. Texas*, 613 S.W. 2d 497, 502-3 (1981). Here, no examination was made by this witness, and yet he was permitted to make a claim of expertise and testify on this very likely damning issue. The "leading texts on forensic psychiatry take for granted that the clinician will interview the subject before testifying about [her]." Bonnie & Slobogin, "The Role of Mental Health Professionals in the Criminal Process," 66 *Va. L. Rev.* 427, 496, n. 204 (1980). When no personal examination is made, the testimony is "of doubtful worth and often of dubious ethical quality." Diamond & Louisell, "The Psychiatrist as an Expert Witness: Some Ruminations and Speculations," 63 *Mich. L. Rev.* 1335, 1347 (1965), as California, Texas, and even Henry Adams himself recognize.[1/] While gross psychopathology may occasionally be based on observation of the defendant in the courtroom, Henry Adams made no such observation, and went beyond an evaluation of gross psychopathology. Additionally, the issue was not framed as a hypothetical question, and cannot be sustained under this approach.

3. The Expert Witness Based His Conclusion on Hearsay and Materials Not in Evidence Before the Jury.

In *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978), this Court declared that one accused of a crime is entitled to have

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[1/] Adams himself admitted, in cross-examination:

> "Granted, if you actually examine the patient, you would feel much more comfortable about the accuracy of your opinion. (A-33.)

He further stated in his letter to the District Attorney:

> ". . . the conclusions I have reached in this case should be viewed with caution since I have not examined the patient." (A-36.)

his guilt or innocence determined "solely on the basis of the evidence introduced at trial" and that due process may well be violated if "circumstances not adduced as proof at trial" are considered by the fact-finder. Adams' testimony created a genuine danger that the jury would sentence Defendant to death on the basis of facts not in evidence before them. The great majority of the materials which Henry Adams relied upon in forming his opinion were not admitted into evidence at the sentencing proceeding. The hospital and psychiatric reports and interviews with unidentified jailers were not placed in evidence at the guilt or sentencing phases. (A-25, A-26, A-38.)

Allowing opinion testimony under such circumstances in a capital case is patently unfair, as it substantially forecloses any opportunity for the jury to assess the reliability of the predictions made. Even if these jurors were in fact willing to inquire into the appropriateness of the prediction, and to somehow "sift the mystique from the facts," Brief, *Amicus Curiae*, American Psychiatric Association, *supra* at 17, they were at a substantial disadvantage as there was insufficient introduction and description of the facts relied upon.

Testimony as to future dangerousness has been barred under similar circumstances, *Holloway v. Texas*, *supra*, on traditional evidentiary principles,[2/] and a similar result should be reached under the Eighth and Fourteenth Amendments.

[2/] Although Fed. R. Evi. 703 may admit this form of testimony, one can question whether the cases preceding it, and upon which the rule was supposedly based, would support this view. See *Jenkins v. United States*, 307 F. 2d 637, 642 (D.C. Cir., 1962) (expert opinion did not rely solely on reports not then in evidence but also on his own earlier examination). Further, the facts or data relied on must be of a type reasonably relied upon by experts in the particular field. One may question whether this form of testimony meets the general acceptance in the scientific community test of *Frye v. United States*, 293 F. 1013 (D.C. Cir., 1923), see Dix, *supra* at 8-22, and whether such predictions are reasonably made when relying upon these forms of materials,

The Sixth Amendment right to confrontation is also implicated by this practice. Much, if not all, of the material relied upon was and/or contained hearsay. Some, admitted in the guilt phase, apparently fit into an exception to the Georgia hearsay rules. It is difficult to assess if the other materials would have been admissible under Georgia's hearsay exception or other provisions, see Ga. Code Ann. §§ 38-301, 38-302, 38-305, 38-306, 38-310, 38-409, 38-411, 38-414, and 38-418 (A-62, A-63), as the nature and contents of the materials were not particularized. One similarly cannot assess whether "substantial reasons existed to assume [the hearsay's] reliability," *Green v. Georgia*, 442 U.S. 95, 97 (1979). The prosecution did not proffer, and was not required by the Court to proffer, these materials. It would appear that as there was no opportunity to cross-examine whatever declarants were involved, a violation of the Sixth Amendment right arose. *California v. Green*, 399 U.S. 149 (1970).

If a substantial constitutional question potentially arises from an appellate court's reliance upon extra-record material to affirm the death sentence, see *Brown v. Wainwright*, ___ U.S. ___, 102 S. Ct. 542, 70 L. Ed. 2d 407 (1981) (dissent from denial of certiorari of Justices Marshall and Brennan), and *Ford v. Strickland*, 676 F. 2d 434, 450-456 (11th Cir., 1982), *reh. granted en banc*, then certainly a sentencing jury's reliance

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2/ (Continued)

and without any personal observation by the expert. See McElhaney, "Expert Witnesses and The Federal Rules of Evidence," 28 *Mercer L. Rev.* 463, 483-487, and n. 93 (1977). Further, Fed. R. 403 may preclude such evidence due to its potential for prejudice.

Georgia had traditionally required that testimony be based on facts then in evidence, see *Stancill v. McKenzie Tank Lines*, 497 F. 2d 529, 536 (5th Cir., 1974), but recently altered that position.

upon an expert's opinion drawn from extra-record material is deserving of this Court's review.[3/]

Petitioner Buttrum believes the Georgia Supreme Court's characterization of Henry Adams' opinion as proper under Georgia law because it was only "based in part on facts not in the record," *Buttrum v. State* at 7, seriously understates the relative amount of extra-record evidence considered--some of the photographs may have been in evidence before the sentencing jury, the remainder was not. In any event, a state procedural or evidentiary rule which "diminishes the reliability of the sentencing determination" must be invalidated by this Court to insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion." *Beck v. Alabama*, *supra*, at 637-638.

[3/] In the dissent from denial of certiorari, *Brown v. Wainwright*, 2d, 408, Justice Marshall expressed concern that the consideration of material not presented at trial and not a part of the trial record or record on appeal was:

> "inconsistent with this Court's past insistence on strict procedural regularity in the imposition and review of capital sentences. See *Gardner v. Florida*, 430 U.S. 349 . . . (1977), [as] much of the information appears to be inadmissible and unreliable hearsay." *Id.*

Justice Marshall feared that the information "untested by the adversary process" would "distort the State Supreme Court's appellate functions" of review of the propriety of a death sentence. *Id.*

Similarly, here information is being relied upon by an expert to form an opinion that may very well be dispositive to the jury considering whether to impose the death penalty. Although the expert here was subject to cross examination, counsel was at a substantial disadvantage in attempting to impeach his opinion as much of the basis for it was not clearly identified or explained.

4. The Trial Court Repeatedly Refused the Indigent Janice Buttrum's Requests for an Independent Psychiatric Examination.

Under the circumstances of this case, the rejection of Janice Buttrum's repeated requests for an independent psychiatric examination at state expense denied her a "fair and adequate opportunity" to defend against the expert witness prediction testimony, as required by the Fourteenth Amendment due process, *Chambers v. Mississippi*, 410 U.S. 284, 294, 302 (1973) and equal protection clauses, *Ross v. Moffit*, 417 U.S. 600, 616 (1974), and the Sixth Amendment right to effective assistance of counsel, *Powell v. Alabama*, 287 U.S. 45, 71 (1932). Any of these three provisions may be denied when the court refuses to expend state funds and the expert services requested are necessary to the preparation and presentation of an adequate defense. *Williams v. Martin*, 618 F. 2d 1021 (4th Cir., 1980).

The standard for determining whether expert assistance is constitutionally required by the equal protection or right to counsel clauses is:

> "Whether a substantial question requiring expert testimony arose . . . . and whether [Petitioner Buttrum's] defense could be fully developed without professional assistance." *Id.*, at 1026.

In *Little v. Streater*, 452 U.S. 1, 6 (1981), this Court required analysis of three factors in determining whether the defendant is deprived of his due process right to "a meaningful opportunity to be heard:"

> "the private interests at stake, the risk that the procedures [otherwise] used will lead to erroneous results and the probable value of the suggested procedural safeguard, and the governmental interests affected."

When these analyses are applied in the instant case, the deprivation of rights is plain. Here, the interests of Janice Buttrum are the greatest the law and nature recognize--life itself. The prosecution, by its own action in presenting Adams as their sole witness at sentencing, has made expert analysis of eighteen year old Janice Buttrum's future dangerousness a critical, if not dispositive, factor for the jury's decision whether she should live or die.

Further, as noted earlier, very substantial questions are raised as to whether experts can give reliable predictions as to future dangerousness, let alone under the methods engaged in by Adams. A clear likelihood existed that Adams' prediction was erroneous.

One can question the value of the procedural safeguard requested by counsel, that of an independent psychiatric examination, since as Janice Buttrum has earlier argued, any prediction made is likely to be unreliable, and should be therefore inadmissible in capital sentencing proceedings. However, if such a prediction is to be admitted, as it was in this case, a capital defendant is entitled to a fair opportunity to rebut the diagnosis and prediction made. That fair opportunity requires a resort to the same type of evidence, expert testimony, but, hopefully of a more reliable type, that based on a personal examination engaged in for this purpose.

Rejection of this assistance served no substantial governmental interest. The Georgia Supreme Court's conclusion that "the Petitioner made no contention that any critical evidence was subject to varying opinion," (A-5) is totally inaccurate in respect to the request for this assistance. The Georgia Supreme Court relied upon a response given by defense counsel at a hearing on February 24, 1981, six months before trial. Even

the Prosecution admitted in its appellate brief that this response related to the request for an independent forensic criminologist. (A-20, A-21.) The request for funds for an independent psychiatrist at issue here was made when defense counsel received, just ten days prior to trial, the report which Adams had provided the prosecution. At a hearing on August 19, 1981 (A-53, A-54, A-55), defense counsel strongly argued that:

> "The conclusions which he (Adams) reaches are vastly different and in excess of the conclusions reached by the team at Milledgeville--the state psychologists and psychiatrist. We're very concerned about the potential impact of testimony of the nature which we would anticipate . . . We don't have access to a person [private, non-state system psychologist or psychiatrist] like Dr. Adams, and we feel like in fundamental fairness, the dictates of the Fourteenth Amendment . . . demand that we be treated fairly and that we have an adequate opportunity to countermand this sort of very significant evidence." (A-56, A-57.) (Emphasis added.)

Clearly, this was critical evidence and it already appeared capable of being subject to some varying opinion.[4/] By the Georgia Supreme Court's own standard of abuse of discretionary review, then, it appears Janice Buttrum should have been given an independent psychiatric examination. Yet, she was not, and her life is at this time forfeited.

[4/] Further, it is not constitutionally:

> "incumbent upon [Janice Buttrum] to prove . . . that an independent expert would have provided helpful testimony at trial. An indigent prisoner 'should not be required to present proof of what an expert would say when he is denied access to an expert.'" *Williams, supra* at 1026-1027.

The fact that defense counsel had an opportunity to cross-examine Adams does not suffice; a fair opportunity to rebut this testimony required an independent psychiatric examination. Firstly, the jury was still permitted to rely upon what purported to be an expert opinion, and had no witness of similar or equal qualifications before them with which to compare his opinion. Although reference was made in cross that the State, when examining Janice Buttrum's competency to stand trial, had reached a conclusion of "no mental disorder," (A-36), there was ambiguity as to whether there was actually "no medical diagnosis" made (A-34), as displayed by Adams' testimony, "I went through all of their information, and simply because they did not decide that there was no medical diagnosis . . . I don't have to come to their same conclusion . . ." (A-34, A-35.) The ability to cross-examine was thus insufficient to overcome the very substantial disadvantage at which Petitioner Buttrum was placed without an independent psychiatric examination to assess the likelihood of future criminal acts.

Adams' reliance on these competency evaluation reports to form an opinion as to future dangerousness is itself particularly dubious. A prediction of future dangerousness requires substantially expanded clinical predicates, Kozol, et al., "The Diagnosis and Treatment of Dangerousness," 18 *Crime and Delinquency* 371, 380-384 (1972); Mergergee, "The Prediction of Dangerous Behavior" 3 *Crim. Jus. & Behavior* 1, 8-9 (1976), and, as the experts and courts have recognized, varies considerably from the clinical predicates for a competency evaluation. *Amicus* Brief, *supra* at 20, n. 11; *United States v. Taylor*, 437 F. 2d 371 (4th Cir., 1971); *United States v. Alvarez*, 519 F. 2d 1036 (3rd Cir., 1975); *United States v. Fortune*, 513 F. 2d 883 (5th Cir., 1974); *United States v. Walker*, 537 F. 2d 1192 (4th Cir., 1976). "Under no circumstances should an examination focused on competency to stand trial, or even on the defendant's mental

state at the time of the offense, be used as a basis for formulation of an opinion on dangerousness," Bonnie, "Foreword: Psychiatry and the Death Penalty: Emerging Problems in Virginia," 66 *Va. L. Rev.* 167, 177 (1980), yet this is the primary clinical data that Henry Adams relied upon.

This very significant distinction between competency evaluations and evaluations for future dangerousness is even more troubling because the trial court's apparent reason for denying an independent psychiatric examination was that the state psychologists and psychiatrists at Milledgeville could be presented on Janice Buttrum's behalf to counter the anticipated testimony of Henry Adams. (A-53.) As these evaluations were simply for competency purposes, and there was ambiguity even as to whether any medical diagnosis had been made, these experts could provide no viable expert witness testimony as to future dangerousness.

Janice Buttrum required what she repeatedly requested, an independent psychiatric examination, if she was to attempt to refute Henry Adam's medical diagnosis and prognosis for her future. Janice Buttrum doesn't have to prove that with a further psychiatric examination there would have been, see fn. 4, *infra*, a different medical diagnosis, but that possibility is clear. Even if examination yielded the same medical diagnosis, some question may have been raised as to whether such an individual could be treated, or eventually rehabilitated. As noted in the *Amicus* Brief of the American Psychiatric Association, at 20, n. 11, "Some techniques may be effective in the treatment of anti-social personality in juvenile offenders . . ." Paraphiliac sexual sadists may have some capabilities for treatment, also. Schmidt, "Biochemical Methods in the Treatment of Sexual Disorders," Vol. 3, No. 1 *Psychiatric Clinics of North America* 189, 195-196 (April, 1980). With expert testimony on her behalf,

Janice Buttrum may have been able to challenge the picture of never-ending sexual violence so carelessly painted by Henry Adams. To add a further nail to the coffin, after the trial court denied counsel's request for a psychiatric examination at the August 19th hearing, (A-53, A-54), the defense then requested a continuance to respond to Adams' proposed testimony, if not by an independent examination, then by:

> "either a trip to Milledgeville or to sit down with Dr. Bullard to prepare to deal with this sort of adverse testimony; and we feel like we were pushing very closely with the time of the trial and that this disclosure [Adams' Report] comes very late." (A-59.)

This too was denied. The trial court apparently believed that the five days left prior to trial was adequate since initial overtures to these persons had been made. Of course, much remained to be done in that time period, and there was no recess between the guilt and sentencing phases in which to engage in the extensive preparation for this testimony. This further diminished the capability of counsel to "cure" the error in denying a psychiatric examination by the cross-examination of the state's witness.

Taken singly, the failure to provide an independent psychiatric examination to capital defendants when evidence of future dangerousness is presented by the State violates the Sixth and Fourteenth Amendments. When combined with the other issues presented herein, it is clear that Janice Buttrum did not receive a fair and reliable determination of sentence.

5. The Expert Witness was the Only Witness Called by the Prosecution at the Sentencing Proceeding.

The prejudice to Petitioner Buttrum is quite obvious. Henry Adams was the only witness called by the prosecution at the sentencing proceeding. He testified that Janice Buttrum was,

"an anti-social personality and a case of paraphilia sexual sadism," of "polymorphous sexual perversion," (emphasis added), who would be "expect(ed) to continue" to engage in "almost any activity that will turn [her] on of a sexual nature, varying from heterosexual or homosexual to whatever." (Emphasis added.) (A-29, A-30.) Adams further testified that sexual sadists:

> "induce their sexual pleasure" "by the pain of the victim," [and that] "When the disorder really becomes severe, they may torture, kill, mutilate their victims. It is a repetitive kind of activity that continues until the individual is apprehended, or stopped in some way or another . . . It is a biological drive with biological rhythm." (A-22, A-23, A-24.) (Emphasis added.)

His testimony paralleled the definition of the aggravating circumstances. The trial court instructed the jury that it may only impose the death sentence if it found one or more of the aggravating circumstances beyond a reasonable doubt. (A-48.) The court charged on four aggravating circumstances. As to the first, murder committed while the Defendant was engaged in the commission of rape, the Court instructed: ". . . you would have to find that this Defendant aided and abetted a male individual" (A-46) "to rape the victim." For the second, the court instructed that "the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim." (A-47.) For the third, that "it involved depravity of mind of the Defendant," and that "the word depraved has also been defined as 'marked by corruption or evil, or especially perverted.'" (A-47, A-48.) The fourth, that of aggravated battery to the victim, was described as "maliciously causing bodily harm to another . . . by seriously disfiguring a body or a member thereof." (A-48.)

The relationship between the testimony offered and the aggravating circumstances is obvious. This was the only witness the prosecution called at the sentencing proceeding to establish aggravating circumstances. The jury was free to and apparently did rely on it in reaching their conclusion that Janice Buttrum was guilty of each of these aggravating circumstances.[5/]

Although evidence was presented as to relevant mitigating circumstances, particularly Janice Buttrum's youthful age, and her deprived upbringing, the expert prediction of future sexually sadistic violence, of apparent incurability of her condition, may have deprived her of hope for life imprisonment.

The prosecutor's closing argument exhorted the sentencing jury to consider this "deviant pervert, a murderer, a butcher (A-41), as one who "potentially could do it again." (A-42.) He impressed on the jury the fear that this youthful offender will kill again: "Who will be next? You? Your wife? Your daughter?" (A-42), and finally, "God save us all from Janice Buttrum . . . May Janice Buttrum never again haunt society." (A-43.)

The prediction of future dangerousness herein clearly "implant[ed] in the mind of each juror the message that the death penalty . . . is the only way to protect society from the defendant," *Hurtishaw, supra*, 631 P. 2d at 470, even though some mitigating factors were present. Thus, substantial likelihood exists that this fear of future dangerousness so infected the jury determination as to result in a sentence based on emotion or caprice rather than reason. *Beck, supra*, at 638.

[5/] A constitutional issue arises if the jury improperly concluded that one of several aggravating circumstances was proven. *See Zant v. Stephens*, ___ U.S. ___, 102 S. Ct. 1856 (1982). Although the photographs of the victim placed in evidence at the sentencing hearing may possibly help to support a finding of torture or aggravated battery, the prosecution presented no other witnesses at the sentencing hearing to testify to depravity of mind or rape of the victim.

CONCLUSION

For the State to forfeit a human life on the basis of unreliable evidence is shocking. To be unable to effectively rebut that evidence because of one's poverty is patently offensive to any sense of fair play.

Yet, "expert" predictions as to future dangerousness are being made in many sentencing hearings in this country. In some, the fate of indigent capital defendants like Janice Buttrum are being sealed, while they are deprived of expert assistance with which they could at least dispute the forecast made.

This Court has already gone to some extraordinary measures to ensure that the capital defendant is afforded process that will guarantee, as much as is humanly possible, that the sentence is not imposed out of whim, passion, prejudice or mistake. An *Amicus* Brief has already been presented to this Court attesting to the substantial likelihood of mistakes in expert witness predictions of future dangerousness, an *Amicus* Brief prepared by those very persons expected to make these predictions. Their doubts, and fears of capricious impositions of the ultimate penalty, are as well-founded today as they were then.

Yet, if this Court should be willing to permit expert witness prediction testimony, it must recognize and act now upon its constitutional responsibility to assure that indigent capital defendants across this country have an adequate opportunity to contest this expert testimony.

For the reasons presented in the foregoing argument, Janice Buttrum respectfully requests that this Court grant her Petition for Writ of Certiorari to the Georgia Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition for Writ of Certiorari was sent by ordinary mail to Mr. Michael J. Bowers, Attorney General, Judicial Building, Room 132, Atlanta, Georgia 30334, and Mr. Stephen A. Williams, District Attorney, Conasauga Judicial Circuit, Whitfield County Courthouse, Dalton, Georgia, 30720, Counsel for the Respondent, on this 6th day of October, 1982.

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